Gula Perak Bhd v Varghese Mathai

HIGH COURT (KUALA LUMPUR) – ORIGINATING PETITION NO D3-33-6-88
VC GEORGE J
26 MAY 1988

Civil Procedure – Application to be added as party in cause or matter – Conditions of – Whether inherent jurisdiction of court should be invoked to allow intervention – Rules of the High Court 1980, O 15 r 6(2)(b)(ii)

Companies and corporations – Waiver by secured creditors of substantial portion of claim – Scheme of arrangement between petitioner and unsecured creditors in respect of unsecured debt – Companies Act 1965, s 176

Mr Varghese Mathai seeks to be added as a party in this originating petition as a respondent by invoking, inter alia, O 15 r 6(2)(b)(ii) of the Rules of the High Court 1980. The cause or matter here is the petition by the petitioner Gula Perak Bhd, the object of which is to seek the sanction of the court for a scheme of arrangement pursuant to s 176 of the Companies Act between the petitioner and its unsecured creditors in respect of the unsecured debts of the petitioner. The secured creditors of the petitioner had waived a substantial portion of their claims without which the petitioner's embarking on the above scheme would have been an exercise in futility. The principal assets of the petitioner are two parcels of leasehold land comprising some 17,691.297 acres in the State of Perak. These lands as well as all other properties movable and immovable of the petitioner had been charged to certain banks by the creation of a debenture (the first debenture), the benefit of which was duly assigned and is now vested in Telok Plantations Sdn Bhd. There was later created a further fixed and floating charge of all the assets of the petitioner in favour of Imatex Bhd by way of a second debenture, to rank pari passu with the earlier debenture. Mr Varghese Mathai contends that he is a substantial minority shareholder of Telok Plantations Sdn Bhd and Osvar Development Sdn Bhd which, together with the subsidiary companies that they control, control the petitioner. Telok Plantations Sdn Bhd is also the biggest creditor of the petitioner and it was at its instance that the petitioner was placed in the hands of receivers. It was suggested by Mr Mathai that the basis for the proposals put forward to Telok Plantations Sdn Bhd to go along with the proposed scheme of arrangement was erroneous and runs foul of prudent management and business sense.

Held, dismissing the application with costs:

(1) For there to be jurisdiction to add Mr Mathai as a party, it has to be established that there is a question or issue to be tried as between Mr Mathai and one of the existing parties in the petition, and that the question or issue arises out of or relates to or is connected with any relief or remedy claimed in the petition. The court further has to be satisfied that it would be just and convenient for the question or issue to be determined as between the intervener and that party and between the existing parties to the petition.

(2) From the facts, Mr Mathai's dispute is with the petitioner's secured creditors who are not parties to this petition. That does not satisfy the requirements of the rule.

(3) Mr Mathai could very well come within the exception to *Foss* v *Harbottle*,[2] and he could in those circumstances bring a derivative action.

(4) The invocation of O 15 r 6(2)(b)(ii) of the Rules of the High Court 1980 and of the inherent jurisdiction of the court are both misconceived.

Cases referred to
1 *The Mardina Merchant* [1975] 1 WLR 147 (not folld)
2 *Foss* v *Harbottle* (1843) 2 Hare 461; 67 ER 189 (refd)

Legislation referred to
Companies Act 1965 ss 176, 181, 218
Rules of the High Court 1980 O 15 r 6(2)(b)(ii)

G Sri Ram (*G Lim* with him) for the petitioner.
AJ Dason (*Mathew Varghese* with him) for the respondent.

Cur Adv Vult

VC George J: Mr Varghese Mathai seeks to be added as a party to this originating petition as a respondent. He invokes, inter alia, O 15 r 6(2)(b)(ii) of the Rules of the High Court 1980:

> 6(2) At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either of its own motion or on application –
>
> (b) order any of the following persons to be added as a party, namely –
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

In effect for there to be jurisdiction to add Mr Mathai as a party, each of the following has to be established:

(a) that there is a question or issue to be tried as between Mr Mathai and one of the existing parties in the petition; and
(b) that the question or issue arises out of or relates to or is connected with any relief or remedy claimed in the petition.

If the answer to each of the above is in the affirmative, then the question of jurisdiction is in favour of Mr Mathai. However, the court has further to be satisfied that it would be just and convenient for the question or issue to be determined as between the intervener and that party and between the existing parties to the petition at the hearing of the petition before granting the application to intervene.

The cause or matter here is the instant petition by Gula Perak Bhd (in receivership), the object of which is to seek the sanction of the court to a scheme of arrangement pursuant to s 176 of the Companies Act 1965 between the petitioner and its unsecured creditors in respect of the unsecured debts of the petitioner.

The principal assets of the petitioner are two parcels of leasehold land comprising some 17,691.297 acres in the State of Perak. These lands as well as all other properties movable and immovable of the petitioner had been charged to certain banks by the creation of a debenture (the first debenture) the benefit of which was duly

assigned and is now vested in Telok Plantations Sdn Bhd. There was later created a further fixed and floating charge of all the assets of the petitioner in favour of one Imatex Bhd by way of a second debenture, to rank pari passu with the earlier debenture.

According to the petition, the claims of the two debenture holders as at 30 September 1986 amounted to $43,729,000 and those of the unsecured creditors of Gula Perak Bhd on that date amounted to $18,766,000.

Also, according to the petition it is the opinion of professional valuers whom the receiver of the petitioner had consulted that the 'open market value' of the petitioner's lands, the said principal asset of the company, is only $22,900,000 and the 'forced sale value' only $18,300,000.

It follows that without the secured creditors waiving their claims or a substantial portion of their claims the petitioner embarking on a scheme of arrangement in respect of the unsecured debts would have been an exercise in futility.

By para 37 of the petition, the petitioner says that the secured creditors have agreed to waive $26,079,000 of the amount owing to them said to be about 60% of the aggregate of the secured debts which has resulted in there being sufficient assets to enable the unsecured creditors to be paid 40 cents in the ringgit. Clearly the proposed scheme is admittedly meant to and will substantially affect the debenture holders.

Mr Varghese Mathai contends that he is a substantial minority shareholder of Telok Plantations Sdn Bhd and Osvar Development Sdn Bhd which together with the subsidiary companies that they control, control the petitioner Gula Perak Bhd. Telok Plantations Sdn Bhd is also the biggest creditor of Gula Perak Bhd and it was at its instance that Gula Perak Bhd was placed in the hands of receivers. He contends that it is these related companies that control Gula Perak Bhd who have proposed the instant scheme of arrangement.

Now it seems to me that these contentions are not disputed (at least at this stage and even if disputed not seriously so). Mr Mathai further contends that the amount owing to the secured creditors is substantially larger than that stated by the petitioner. He says that what is owing to Telok Plantations Sdn Bhd alone is some 50 million ringgit and by the terms of the proposed scheme Telok Plantations Bhd would on complete implementation of the scheme realize only some 12 million ringgit. This, according to him, would mean that on the implementation of the scheme as proposed, Telok Plantations Sdn Bhd although a secured creditor will recover only just over 20% of what is owed to it. On the other hand, the unsecured creditors stand to recover 40% of what is owed to them. For Mr Mathai it was pointed out that even on the valuation relied on by the petitioner of the principal asset of Gula Perak Bhd, namely, the lands owned by it, at some 22 million ringgit, Telok Plantations Sdn Bhd as the major secured creditor would, if the receivers had proceeded to wind up and distribute the assets of the company, have been paid an amount substantially larger than the 12.65 million ringgit or so that would be realized by it under the scheme.

It was further contended that the proposals by which eventually Telok Plantations Sdn Bhd would realize the 12.65 million ringgit which it would appear Telok Plantations Sdn Bhd had agreed to accept, was based on certain lands being brought into Gula Perak Bhd which, for purposes of persuading Telok Plantations Sdn Bhd to go along with the proposals, was valued at some 49.4 million ringgit. It was contended that the Capital Issues Committee whose attention had been directed to the proposal and to that valuation, had valued those lands at only 37.875 million ringgit. It was suggested that it follows that the basis for the proposals put forward to Telok Plantations Sdn Bhd to go along with the proposed scheme of arrangement was thus demonstrated to be an erroneous basis and that in spite of that no adjustments had been made to what Telok Plantations Sdn Bhd and the other secured creditors would eventually realize. The suggestion appears to be that if proper adjustments were made in respect of the difference of over 11 million ringgit, the secured creditors would have been entitled to substantially more than what they have agreed to accept and that accordingly the secured creditors' acceptance or agreement to go along with the scheme was based on a misrepresentation.

It was contended that these anomalies justify Mr Mathai contending as he does that the alleged agreement by Telok Plantations Sdn Bhd to waive a substantial portion of what is owed to it and Telok Plantations Sdn Bhd generally supporting the proposed scheme, runs foul of prudent management and business sense.

While neither Telok Plantations Sdn Bhd nor Osvar Development Sdn Bhd have been heard by me in respect of the allegations and contentions made by Mr Mathai (no doubt for the reason that they are not named parties in this petition) it cannot be ignored that Mr Mathai has certainly pointed out tellingly that there appears on the face of it to be peculiar if not dubious decisions on the part of Telok Plantations Sdn Bhd in agreeing to accept amounts less than what it could realize from the ill-fated venture Gula Perak Bhd has turned out to be. I also observe that consistent with that, he has as a minority shareholder in Telok Plantations Bhd (and in Osvar Development Sdn Bhd) initiated proceedings invoking ss 181 and 218 of the Companies Act 1965, claiming fraud and oppression on the minorities which proceedings are pending, I am advised by counsel, before Harun J.

Mr Mathai's problem is that his dispute is with Telok Plantations Sdn Bhd and Osvar Development Bhd who are not parties to this petition and not with Gula Perak Bhd who is the petitioner. He has tried to get round that by contending that Telok Plantations Bhd and Osvar Development Sdn Bhd and subsidiaries controlled by those two companies in fact control Gula Perak Bhd and that accordingly, his dispute can be said to be with Gula Perak Bhd.

In my judgment that does not satisfy the requirements of the rule. The petition is between Gula Perak Bhd (in receivership) and the unsecured creditors, one of whom Agri-Projects (M) Sdn Bhd has been allowed to intervene. The best that can be said for Mr Mathai is that he has a quarrel with the persons who control Gula Perak Bhd. That does not entitle him to successfully invoke the rule. The persons who control Gula Perak Bhd are not parties to the cause or matter here.

Mr AJ Dason, counsel for Mr Mathai, sought to invoke the inherent jurisdiction of the court to allow intervention. He cited *The Mardina Merchant*[1] where it was held that if a possible effect of proceedings would be that hardship (or difficulty or danger) would be caused to a person, that person would be allowed to intervene to try to obtain some mitigation of the hardship, difficulty or danger. But *The Mardina Merchant*[1] imposes a proviso which is that the court would so invoke its inherent jurisdiction provided that otherwise there was no remedy available to that person.

In the instant case I am far from satisfied that Mr Mathai is without remedy other than by intervening in these proceedings.

As a minority shareholder in Telok Plantations Sdn Bhd and Osvar Development Sdn Bhd, Mr Mathai would normally be stuck with the decisions of the majority of the shareholders unless he falls within the exception to the rule in *Foss* v *Harbottle*.[2] As counsel for him has pointed out, he could in those circumstances step into the shoes, as it were, of Telok Plantations Sdn Bhd or Osvar Development Sdn Bhd as the case may be and bring a derivative action. In my judgment he has in his affidavits before me shown that he could very well come within the exception to *Foss* v *Harbottle*[2] vis-à-vis the decisions taken by the majority of the shareholders or the board of directors in those two companies in respect of waiving a substantial portion of their secured debt. What the majority shareholders have to say in reply to the allegations and contentions by Mr Mathai is another matter.

The invocation of O 15 r 6(2)(b)(ii) of the Rules of the High Court and of the inherent jurisdiction of the court are both misconceived. The application is dismissed with costs.

Order accordingly.

Solicitors: *Rashid & Lee*; *Dason & Co.*

Reported by *Wong Kim Fatt*